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No. 01-167

IN THE

Supreme Court of the United States

GLENN K. JACKSON and ELSIE JACKSON,

Petitioners,

v.

WEST TELEMARKETING CORPORATION, WEST TELEMARKETING CORPORATION OUTBOUND, STEVEN GARZA, and PROVIDENCE COMMERCIAL REAL ESTATE SERVICES, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF

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Petitioners file this reply to new points raised by respondents, and respectfully urge this Court to grant the petition for a writ of certiorari.

I. Jackson did not waive his contention that California should be the forum state.

Respondents contend that Jackson waived his contention that California should be the forum state in a choice of law analysis. They correctly state the general rule that an appellate court usually does not give consideration to issues not raised below. This rule, however, is inapplicable in this case for three reasons.

First, waiver was not the basis for the Fifth Circuit's decision. *See Jackson*, 245 F.3d 518, 522 (5th Cir. 2001). Second, the choice of law issue was raised before the district court. Jackson always contended that California law should apply in this case. Granted, Jackson did not pointedly address whether Texas versus California *choice of law* principles should apply, but both parties extensively briefed whether Texas versus California law should apply. To preserve a choice of law issue for appeal, a party needs only to timely notify the court of the applicability of another state's law. *E.g., Jaurequi v. John Deere Co.*, 986 F.2d 170, 173 (7th Cir. 1993).

Jackson did not take any action inconsistent with his argument that California law should apply. When they addressed this issue before the Fifth Circuit, respondents cited portions of Jackson's trial-court briefs for the proposition that Jackson "conceded" Texas choice of law rules apply. However, the briefing they cited was merely statements made *arguendo* that even under Texas choice of law rules, California law should apply to the merits of the case. The same position was asserted in the court of appeals. Therefore, the waiver doctrine does not

bar Jackson from complaining on appeal that the district court applied the wrong choice of law rules.

Third, even if the issue were not artfully briefed enough to be deemed "raised" before the trial court, this Court can and should address it in this appeal. The waiver rule is not one of jurisdiction, but discretion. *Singleton v. Wulff*, 428 U.S. 106, 49 L. Ed. 2d 826, 96 S. Ct. 2868 (1976). A court of appeals has broad discretion to consider choice of law issues not raised in the district court in the interest of justice. *Id.*; *Booking v. General Star Management Co.*, 254 F.3d 414, 418, 419 n.4 (2d Cir. 2001); *Massachusetts Bay Ins. Co. v. VIC Koenig Leasing, Inc.*, 136 F.3d 1116, 1122 (7th Cir. 1998). A choice of law analysis, characterized as a purely legal issue, is of crucial importance because, as here, it is often outcome determinative. *Booking*, 254 F.3d at 419; *Massachusetts Bay*, 136 F.3d at 1122 (citing *Ruiz v. Blentech Corp.*, 89 F.3d 320, 324 (7th Cir. 1996), *cert. denied*, 519 U.S. 1077, 136 L. Ed. 2d 677, 117 S. Ct. 737 (1997)).

The failure to address the issue of whether the transfer was effected under § 1404(a) or 1406(a) in this case, based on the waiver doctrine, would result in manifest injustice. The motion to transfer was respondent's motion, not Jackson's. Jackson consistently argued that California law should apply, and he argued that result would obtain even under respondents' argument that Texas choice of law rules should apply. In the end, because the California district court did not render an order that specified the basis for the transfer, a California resident who suffered harm in California was denied his claim based on a repealed Texas statute of limitations when the bulk of the events giving rise to his claim did not even occur in Texas. Under these circumstances, this Court can and should address the transfer and choice of law issue. The court of appeals did. *Jackson*, 245 F.3d at 522.

Respondents also cite *Martin v. Stokes*, 623 F.2d 469, 474-75 (6th Cir. 1980) as support for their argument. In *Martin*, the plaintiff filed a diversity suit in federal district court in Virginia against Kentucky defendants over an automobile accident that occurred in Kentucky. The court transferred the case to a Kentucky federal district court, but did not specify whether the basis for the transfer was 28 U.S.C. § 1404(a) or 1406(a). The Kentucky court applied a Kentucky state statute of limitations and dismissed the cause. The plaintiff appealed, arguing the Kentucky court should have applied Virginia state law. The court of appeals held that the proper resolution of the choice of law issue depended upon whether the Virginia federal district court had personal jurisdiction over the defendants. *Martin*, 623 F.2d at 474-75. The court of appeals remanded the case for further proceedings and a determination of the jurisdictional issue. *Id.* at 475. Thus, *Martin* has nothing to do with waiver. It stands only for the proposition that to the extent the existence of personal jurisdiction is relevant to whether a transfer is effected under § 1404(a) as opposed to § 1406(a), a remand is appropriate if the jurisdictional issue is undecided at the district-court level.

II. Under California choice of law principles, California law should have been applied.

Respondents next argue that even if the district court had applied California choice of law principles, Texas substantive law would have been applied. That argument has no merit.

California courts generally follow a three-step "governmental interests" approach in analyzing choice of law issues. First, they determine the applicable rule of law in each potentially concerned state, to see whether it really differs from California law (thus avoiding "false" conflicts). Second, they determine what interest, if any, each state has in having its law

applied in the particular case. Finally, if the law is different and if each state has an interest in having its laws applied (a "true" conflict), they select the law of the state whose interests would be more impaired if another state's law were applied. *E.g., Bernhard v. Harrah's Club*, 16 Cal. 3d 313, 128 Cal. Rptr. 215, 546 P.2d 719 (1976), *accord, Industrial Indemnity Co. v. Chapman & Cutler*, 22 F.3d 1346 (5th Cir. 1994) (applying California law). California does not disregard the factors stressed by the Second Restatement § 6 (which Texas courts must apply), but examines them with the primary objective of ensuring that application of the law in the particular context serves the purposes for which the law was created. *E.g., Stonewall Surplus Lines Ins. Co. v. Johnson Controls, Inc.*, 14 Cal. App. 4th 637, 645 (Cal. Ct. App. 1993).

Application of California's choice of law rules would lead to the application of California substantive law in this case. First, the applicable rules of law in California and Texas differ in important respects. For example, California, along with forty-two other states, applies the Uniform Trade Secrets Act, 14 U.L.A. 437. On the other hand, only eight states, of which Texas is one, continue to rely on common law to protect trade secrets. More important, Texas and California had different statutes of limitations for trade secret claims at the time Jackson filed his claims. California had a three-year limitations statute. *See* Cal. Civ. Proc. § 343 (2001). Texas, on the other hand, had a two-year statute. *See Computer Assoc. Int'l, Inc. v. Altai, Inc.*, 918 S.W.2d 453, 458 (Tex. 1994).

Because there are significant conflicts between the laws of the two states, under California's conflicts analysis a court must examine the two states' interests in having their laws applied. Jackson has already, in his Petition for Writ of Certiorari, detailed some of the interests California has in having its laws applied here. Furthermore, Jackson there explained why Texas

does not have a strong interest in having its laws applied in this case (primarily because Texas had changed its statute of limitations for trade secret claims to match California's by the time of the transfer). *See* Petition for Writ of Certiorari at 18. In sum, Texas's interest in the real estate in San Antonio does not overshadow California's interest in protecting its citizen who has been injured in California. This is especially true in light of the facts that the events giving rise to Jackson's claims occurred in several states, and that Jackson's claims focus on the misappropriation of his confidential *bid*, not the real property in Texas. Any claim impacting title to the real property was disclaimed below.

Respondents contend that a forum selection clause between the parties dictated that Texas law would govern. That is incorrect. The forum selection clause did not pertain to the Phase I transaction at all. Indeed, Jackson was not even a party to the Phase I transaction, and did not sign any contracts respecting it. Respondents wholly fail to address this fact. The forum selection clause upon which respondents rely appeared in a contract concerning the Phase IV transaction, and the bulk of Jackson's claims are not based on that contract. Rather, Jackson's claims are based in tort, equity, and statutory principles not covered by the forum selection clause. Respondents do not address this fact either. Viewed properly, Jackson's claims should have been adjudicated in accordance with California substantive law, especially under California choice of law rules.

III. The Fifth Circuit's decision does conflict with *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988) and other circuit decisions.

Respondents correctly construe this Court's decision in *Stewart* to say transfers may be had under § 1404(a) when venue is proper in the original court, and they correctly point out that transfers from an improper venue may be had under § 1406(a). But respondents further read *Stewart* to mean that whenever a defendant even *alleges* venue is improper in the plaintiff's chosen forum, § 1406(a) must apply.

Respondents' extrapolation is not supported by the *Stewart* opinion. The relevant portion of the opinion simply states that the parties *did not dispute* whether the chosen forum was a proper venue. *Stewart*, 487 U.S. at 29 n.8. It does not say that the lack of a dispute over venue was a basis for this Court's holding that transfers based on forum selection clauses are governed by § 1404(a). *Stewart* holds that a forum selection clause does not invalidate other venues that meet the federal venue statutes, and when venue is proper under those statutes, a transfer to another venue based on a forum selection clause is governed by § 1404(a).

The courts below erroneously applied these holdings in this case. Respondents argued to the California district court that venue was improper *because of the existence of a forum selection clause*. *Jackson*, 245 F.3d at 522. They did *not* argue that venue was improper under the general venue statutes. Respondents argued a transfer was appropriate, based upon the forum selection clause, under either § 1404(a) or 1406(a). The California district court transferred the case "based upon the forum selection clause." Although the court did not expressly find that venue was improper, nor did it state the statutory ground for its ruling, there is only one logical conclusion based on the

pleadings. That is, the California district court transferred the case because it thought the forum selection clause rendered Texas a more appropriate venue.

The Fifth Circuit assumed the California district court had found venue lacking, but wrongly jumped to the conclusion that this unjustified, assumed finding automatically rendered § 1404(a) inapplicable. *Jackson*, 245 F.3d at 522. The court of appeals erred because it failed to recognize the faulty basis for its unjustified assumption — that venue was lacking solely because the forum selection clause existed — a conclusion that violates the holding in *Stewart*. The Fifth Circuit could have and should have independently evaluated whether venue was proper under 28 U.S.C. § 1391. That is the only way, absent remand, to resolve the issue of whether a transfer was appropriate under § 1404(a) or 1406(a).

The Fifth Circuit's approach directly conflicts with that of other courts. For example, in *Jumara v. State Farm Ins. Co.*, 55 F.3d 873 (3d Cir. 1995), the court of appeals noted that neither party had argued 28 U.S.C. § 1391 as a basis for venue before the trial court, but went on to hold for the first time on appeal that venue was proper in the plaintiff's chosen forum based upon § 1391(c). Furthermore, the court in *Blue Ash Development, Inc. v. Polan*, 1996 U.S. App. LEXIS 1438 *4 n.1 (6th Cir. Jan. 2, 1996), reached a different result from the Fifth Circuit by pointing out that "It does not appear under [*Stewart*] that a forum selection clause makes the venue 'wrong' " when the action is filed in a district other than that specified in the clause.

In his Petition for Writ of Certiorari, Jackson has already detailed the reasons venue was proper in California under 28 U.S.C. § 1391. Because Jackson brought his claims in a proper venue, the California district court could not transfer

those claims based on a forum selection clause without relying upon § 1404(a). This Court should clarify the law on this issue.

IV. Respondents' personal jurisdictional arguments are irrelevant to the issue on appeal.

Respondents cite authority for the proposition that even if venue is proper in the original forum, but personal jurisdiction is lacking there, the original forum cannot remain the forum, the case may be transferred only under § 1406(a), and the law of the transferee forum must apply. This argument fails for several reasons.

First, there is authority for the proposition that § 1406 can never apply to a case removed to federal court based on diversity when personal jurisdiction was lacking in the state court. *Grimes v. Hull-Dobbs, Inc.*, 154 F. Supp. 151, 152 (E.D. Ky. 1957); 3 A.L.R. Fed. *Improper Venue — Transfer of Case* 467, § 4 (1970). If that authority is correct, there can be no disagreement that the courts below were wrong, under respondents' theory of lack of jurisdiction in California.

There is also, however, authority for the proposition that § 1406 *can* apply to a removed diversity case even if there was no jurisdiction in the state court. *Bentz v. Recile*, 778 F.2d 1026, 1027 (5th Cir. 1985). But even if that is the law, it is not clear that the issue of whether personal jurisdiction exists answers the question of whether a transfer must be accomplished under § 1404(a), § 1406(a), or some other provision. This Court has held that § 1406(a) is broad enough to authorize a transfer whether the court in which the case was filed had personal jurisdiction over the defendants or not. *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 82 S. Ct. 913, 8 L. Ed. 2d 39 (1962). But it is also the rule that § 1404(a) authorizes transfers when personal jurisdiction is lacking. *Bentz*, 778 F.2d at 1027; *Rich v. Southern Gulf Operators*, 879 F. Supp. 49 (E.D. Tex. 1995);

15 Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 3827 (1986) (collecting cases). Thus, the issue of personal jurisdiction does not answer the relevant question — was the transfer made under § 1406(a) or 1404(a)?

There is yet another reason respondents' argument fails. That is, they did not plead for a transfer under § 1406 based on a lack of personal jurisdiction. They only asked for a dismissal under § 1406 on that ground. Their transfer arguments were premised solely upon the existence of a forum selection clause and its purported effect on the propriety of venue. Despite respondents' arguments before the California district court, that court did not dismiss the case. Instead, it transferred the case "based on the forum selection clause." Respondents' argument reduces to the proposition that the California court did something no party asked it to do, and did not disclose its sua sponte decision to the parties.

Nor was personal jurisdiction lacking. West Outbound was subject to personal jurisdiction because, as explained in Jackson's Petition for Writ of Certiorari (and in more detail in briefing before the California district court), West is a telemarketing company that actively seeks new clients in California and does hundreds of thousands of dollars of business annually for its existing California clients. As for the other defendants, the record does not show one way or the other whether they were subject to personal jurisdiction, because they were not joined until after the transfer and the issue was never raised. The respondents who were joined in the suit after it had been transferred are making their due process challenge to the application of California law for the first time in their Brief in Opposition.

But Jackson did establish that all the defendants "aimed" their wrongful conduct at California. In tort cases, jurisdiction

may attach if the defendant's conduct is aimed at or has an effect in the forum state. *E.g., Panavision International, L.P. v. Toeppen*, 141 F.3d 1316, 1321 (9th Cir. 1998) (citing *Calder v. Jones*, 465 U.S. 783, 79 L. Ed. 2d 804, 104 S. Ct. 1482 (1984)). Under this "effects doctrine," personal jurisdiction can be based upon: "(1) intentional actions (2) expressly aimed at the forum state (3) causing harm, the brunt of which is suffered — and which the defendant knows is likely to be suffered — in the forum state." *Panavision*, 141 F.3d at 1321 (citing *Core-Vent Corp. v. Nobel Industries AB*, 11 F.3d 1482, 1486 (9th Cir. 1993)). The record shows that all the conduct of all the named defendants satisfies this test. The theft of California trade secrets, causing damage to Californians in California, is the gravamen of this lawsuit. Like a foreign hacker attacking data in a California computer, respondents' unlawful conduct was squarely aimed at California.

V. Summary judgment was not inevitable against Jackson on the merits of his claims.

Finally, respondents essentially contend that the errors below were harmless because summary judgment would have been proper on Jackson's claims on the merits. Their entire argument on this point is based on the application of Texas law. Obviously, this argument is irrelevant if California law applies, as Jackson has always urged and continues to urge. Indeed, that is what Jackson's Petition for Writ of Certiorari is all about.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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